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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Murray Hooper,

10 Petitioner,

11 v.

12 Charles L. Ryan, et al.,

13 Respondents.
14

No. CV-98-02164-PHX-SMM

DEATH PENALTY CASE

ORDER

15 This case is before the Court on remand from the Ninth Circuit Court of Appeals.
16 (Doc. 140.) The Court is directed to reconsider, in the light of *Martinez v. Ryan*, 566 U.S.
17 1 (2012), Claim 4 of Hooper's habeas petition, alleging ineffective assistance of counsel
18 at sentencing. (*Id.*) The Court is also to reconsider its order denying leave to amend the
19 petition to include Claim 16, alleging that Hooper's Arizona death sentence is based on
20 invalid Illinois convictions. (*Id.* at 2.)

21 The issues have been briefed. (Docs. 147, 152, 157.) For the reasons set forth
22 below, the Court finds that Claim 4 remains procedurally defaulted and barred from
23 federal review and that amendment of the petition to include Claim 16 remains futile.

24 **FACTUAL AND PROCEDURAL BACKGROUND**

25 On December 24, 1982, a jury convicted Hooper and William Bracy of two counts
26 of first degree murder, one count of attempted murder, criminal conspiracy, and other
27 associated crimes. *See State v. Hooper*, 145 Ariz. 538, 543, 703 P.2d 482, 487 (1985);
28 *State v. Bracy*, 145 Ariz. 520, 524–25, 703 P.2d 464, 469–70 (1985).

1 Pat Redmond and Ron Lukezic were partners in a successful printing business in
2 Phoenix called Graphic Dimensions. In the summer of 1980, Graphic Dimensions was
3 presented with the possibility of some lucrative printing contracts with certain hotels in
4 Las Vegas, but these deals fell through.

5 Robert Cruz, a businessman with ties to Chicago and Las Vegas, wanted Redmond
6 killed in order to obtain his interest in the printing business and pursue the Las Vegas
7 contracts. In September 1980, Cruz asked Arnold Merrill if he would be willing to kill
8 Redmond for \$10,000. Merrill declined, but arrangements were made with others. In
9 early December 1980, Cruz and Merrill picked up Hooper and Bracy who arrived on a
10 flight from Chicago.

11 Hooper and Bracy stayed in the Phoenix area for several days. Merrill took the
12 pair to see Cruz, who gave Bracy a stack of \$100 bills, some of which Bracy gave to
13 Hooper. At Cruz's direction, Merrill took Bracy and Hooper to a gun store owned by
14 Merrill's brother, Ray Kleinfeld. Hooper picked out a large knife and Bracy told
15 Kleinfeld to put it on Cruz's account. Kleinfeld gave Bracy a bag containing three pistols.
16 While Petitioner and Bracy were staying at Merrill's home, Merrill introduced them to Ed
17 McCall.

18 A few days later, Merrill drove Hooper and Bracy to a cocktail lounge patronized
19 by Pat Redmond. When Redmond departed, they followed his car. While following
20 Redmond, Merrill noticed Hooper pointing a gun at Redmond's vehicle, getting ready to
21 fire. Merrill swerved from Redmond's car to prevent the shooting. After the failed
22 shooting, McCall told Merrill that he was "joining up" with Bracy and Petitioner.

23 On the evening of December 31, 1980, Hooper, Bracy, and McCall went to
24 Redmond's home and forced their entrance at gunpoint. Redmond, his wife Marilyn, and
25 his mother-in-law Helen Phelps were present. The three victims were taken into a
26 bedroom where they were robbed of valuables, bound with surgical tape, and gagged.
27 Each was shot in the head. Pat Redmond's throat was slashed. Pat Redmond and Helen
28 Phelps died. Marilyn Redmond survived.

1 Hooper and Bracy were convicted and sentenced to death for the murders. On
2 direct appeal, the Arizona Supreme Court affirmed Petitioner's convictions and death
3 sentence. *See Hooper*, 145 Ariz. 538, 703 P.2d 482.

4 Hooper sought post-conviction relief ("PCR") in the trial court. (ROA 1494, 1529,
5 1540, 1570, 1581.) After discovery and the filing of affidavits, the PCR court summarily
6 denied Hooper's first PCR petition. (ROA 1574, 1596.) Hooper moved for rehearing,
7 which was denied. (ROA 1597, 1599.) The Arizona Supreme Court denied Hooper's
8 petition for review. (ROA 1600, 1602.) PCR counsel did not raise a claim of ineffective
9 assistance of counsel at sentencing.

10 In 1991, Hooper filed a petition for writ of habeas corpus in this Court, No. CIV
11 91-1495-PHX-SMM. The Court dismissed the petition without prejudice to allow Hooper
12 to return to state court to exhaust additional claims. Hooper filed a second PCR petition,
13 this time raising a claim of ineffective assistance of counsel at sentencing. (ROA 1626–
14 27.) The PCR court denied relief. (ROA 1720.) Hooper submitted a petition for review,
15 which was denied. (ROA 1733.)

16 Hooper filed a third PCR petition, which was summarily dismissed. (ROA 1741,
17 1769.) Review was denied. (ROA 1771.)

18 In 1998, Hooper returned to this Court and filed an initial habeas petition. (Doc.
19 1.) Subsequently, he filed a supplemental petition for writ of habeas corpus and a
20 memorandum in support. (Docs. 29, 31.) In Claim 16, Hooper alleged that his Arizona
21 sentence violated the Eighth Amendment because the sentencing court relied on invalid
22 Illinois murder convictions to prove that Hooper had previously been convicted of a
23 crime for which, under Arizona law, a sentence of life imprisonment or death was
24 imposable. Hooper alleged that his Illinois murder convictions were invalid because he
25 was tried and sentenced by a judge later convicted of racketeering and taking bribes.¹
26 (Doc. 29 at 9; Doc. 31 at 59.)

27
28 ¹ *See United States v. Maloney*, 71 F.3d 645 (7th Cir. 1995) (upholding former
judge Maloney's convictions).

The Court concluded that Claim 16 was unexhausted. (Doc. 32.) Hooper withdrew the claim and the Court stayed this habeas proceeding pending exhaustion of the claim in state court. (*Id.*) The Court eventually vacated its stay and ordered the parties to brief the procedural status, merits, and requests for evidentiary development as to all claims. (Doc. 55.) Hooper filed, and the Court denied, a motion for discovery and an evidentiary hearing. (Docs. 79, 96.) Subsequently, Hooper moved to add Claim 16 back into his supplemental petition. (Doc. 106.) The Court denied amendment, concluding that Claim 16 was without merit and therefore amendment was futile. (Doc. 114.) The Court denied Hooper's remaining habeas claims on October 10, 2008. (Doc. 125.)

On August 19, 2014, the Ninth Circuit remanded the case for reconsideration of Claims 4 and 16. (Doc. 140.)

CLAIM 4

In Claim 4 of his supplemental habeas petition, Hooper alleges ineffective assistance of counsel at sentencing. (*See* Doc. 31 at 26–38.) The Court found the claim procedurally barred because Hooper did not raise it in his first PCR petition. (Doc. 96 at 12–13, 30.)

A. Applicable Law

Federal review is generally not available for a state prisoner's claims when those claims have been denied pursuant to an independent and adequate state procedural rule. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). In such situations, federal habeas review is barred unless the petitioner can demonstrate cause and prejudice or a fundamental miscarriage of justice. *Id.* *Coleman* held that ineffective assistance of counsel in post-conviction proceedings does not establish cause for the procedural default of a claim. *Id.*

In *Martinez*, however, the Court announced a new, “narrow exception” to the rule set out in *Coleman*. The Court explained that:

Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral

1 proceeding, there was no counsel or counsel in that proceeding was
2 ineffective.

3 566 U.S. at 17; *see also Trevino v. Thaler*, 133 S. Ct. 1911, 1918 (2013).

4 Accordingly, under *Martinez* a petitioner may establish cause for the procedural
5 default of an ineffective assistance claim “where the state (like Arizona) required the
6 petitioner to raise that claim in collateral proceedings, by demonstrating two things: (1)
7 ‘counsel in the initial-review collateral proceeding, where the claim should have been
8 raised, was ineffective under the standards of *Strickland* . . .’ and (2) ‘the underlying
9 ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the
10 prisoner must demonstrate that the claim has some merit.’” *Cook v. Ryan*, 688 F.3d 598,
11 607 (9th Cir. 2012) (quoting *Martinez*, 566 U.S. at 14); *see Clabourne v. Ryan*, 745 F.3d
12 362, 377 (9th Cir. 2014), *overruled on other grounds by McKinney v. Ryan*, 813 F.3d
13 798, 818 (9th Cir. 2015) (en banc); *Dickens v. Ryan*, 740 F.3d 1302, 1319–20 (9th Cir.
14 2014) (en banc); *Detrich v. Ryan*, 740 F.3d 1237, 1245 (9th Cir. 2013) (en banc).²

15 In *Clabourne*, the Ninth Circuit summarized its *Martinez* analysis. To demonstrate
16 cause and prejudice sufficient to excuse the procedural default, a petitioner must make
17 two showings:

18 First, to establish “cause,” he must establish that his counsel in the state
19 postconviction proceeding was ineffective under the standards of
20 *Strickland*. *Strickland*, in turn, requires him to establish that both (a) post-
21 conviction counsel’s performance was deficient, and (b) there was a
22 reasonable probability that, absent the deficient performance, the result of
23 the post-conviction proceedings would have been different.

24 *Clabourne*, 745 F.3d at 377 (citations omitted). Determining whether there was a
25 reasonable probability of a different outcome “is necessarily connected to the strength of
26 the argument that trial counsel’s assistance was ineffective.” *Id.* at 377–78. “PCR counsel

27 ² In *Runnigeagle v. Ryan*, 825 F.3d 970, 981–82 (9th Cir. 2016), the Ninth
28 Circuit rejected the argument, raised by Respondents here, that *Martinez* does not apply
to Arizona cases before 2002, when the Arizona Supreme Court expressly directed
defendants to raise ineffective assistance of counsel claims in collateral proceedings
rather than on direct appeal. *See State v. Spreitz*, 202 Ariz. 1, 39 P.3d 525 (2002).

1 would not be ineffective for failure to raise an ineffective assistance of counsel claim
2 with respect to trial counsel who was not constitutionally ineffective.” *Sexton v. Cozner*,
3 679 F.3d 1150, 1157 (9th Cir. 2012).

4 To establish “prejudice” in the *Martinez* context, a petitioner must show that the
5 ineffective assistance of trial counsel claim was “substantial” or had “some merit.”
6 *Clabourne*, 745 F.3d at 377 (citing *Martinez*, 556 U.S. at 14).

7 Claims of ineffective assistance of counsel are governed by the principles set forth
8 in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail under *Strickland*, a
9 petitioner must show that counsel’s representation fell below an objective standard of
10 reasonableness and that the deficiency prejudiced the defense. *Id.* at 687–88.

11 The inquiry under *Strickland* is highly deferential, and “every effort [must] be
12 made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of
13 counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at
14 the time.” 466 U.S. at 689; *see Wong v. Belmontes*, 558 U.S. 15 (2009) (per curiam);
15 *Bobby v. Van Hook*, 558 U.S. 4 (2009) (per curiam); *Cox v. Ayers*, 613 F.3d 883, 893 (9th
16 Cir. 2010). To satisfy *Strickland*’s first prong, a defendant must overcome “the
17 presumption that, under the circumstances, the challenged action might be considered
18 sound trial strategy.” *Id.* “The proper measure of attorney performance remains simply
19 reasonableness under prevailing professional norms.” *Id.* at 688.

20 With respect to *Strickland*’s second prong, a defendant must affirmatively prove
21 prejudice by “show[ing] that there is a reasonable probability that, but for counsel’s
22 unprofessional errors, the result of the proceeding would have been different. A
23 reasonable probability is a probability sufficient to undermine confidence in the
24 outcome.” *Id.* at 694. “In assessing prejudice, we reweigh the evidence in aggravation
25 against the totality of available mitigating evidence.” *Wiggins v. Smith*, 539 U.S. 510, 534
26 (2003). The “totality of the available evidence” includes “both that adduced at trial, and
27 the evidence adduced” in subsequent proceedings. *Id.* at 536 (quoting *Williams v. Taylor*,
28 529 U.S. 362, 397–98 (2000)).

The remand order states that “the remanded claims are for purposes of remand

1 substantial.” (Doc. 140 at 2.) Because the Ninth Circuit has already found the remanded
2 claim substantial, prejudice has been established. The issue of cause remains—that is,
3 whether post-conviction counsel’s performance was ineffective under *Strickland*. The
4 Court will address cause by assessing the underlying ineffective assistance of trial
5 counsel claim. *See Clabourne*, 745 F.3d at 377–78.

6 **B. Additional facts**

7 **1. Sentencing**

8 A sentencing hearing was held on February 4, 1983. Hooper did not present any
9 mitigating evidence at the presentencing hearing. (ROA 289.) Instead, at Hooper’s
10 sentencing on February 11, 1983, his counsel, Grant Woods, addressed the judge
11 “person-to-person” to argue that Hooper should not be sentenced to death. (RT 2/11/83 at
12 22.) Woods invoked the “basic historical and . . . religious precept . . . that you should
13 show mercy” and “turn the other cheek” and “most importantly that you should not kill.”
14 (*Id.* at 23.) He further argued that it was unnecessary to sentence Hooper to death because
15 he had already received death sentences in Illinois; therefore, the judge would adequately
16 protect society by imposing a life sentence. (*Id.*) Woods concluded: “So I urge you, Your
17 Honor, at the last moment to consider, do justice, protect society, punish the guilty,
18 follow a higher law, and you, yourself, do not kill and let that be the example that you
19 show today. That you will not kill as others have done.” (*Id.* at 25.)

20 The trial court found five aggravating factors. The court determined that Hooper
21 had been convicted on September 23, 1981, of triple homicide, armed robbery, and
22 aggravated kidnapping in Illinois. *See Hooper*, 145 Ariz. at 550, 703 P.2d at 494. This
23 finding proved the aggravating factors set forth in A.R.S. § 13-703(F)(1) and (2); namely,
24 that Hooper had previously been convicted of another offense for which under Arizona
25 law a sentence of life imprisonment or death was imposable and had previously been
26 convicted of a felony involving the use or threat of violence on another person. *Id.* The
27 court found three additional aggravating circumstances: that in the commission of the
28 offense Hooper knowingly created a grave risk of death to another person or persons,
§13-703(F)(3); that Hooper committed the offense as consideration for the receipt, or in

1 expectation of the receipt, of anything of pecuniary value, § 13-703(F)(5); and that
2 Hooper committed the offense in an especially heinous, cruel or depraved manner, § 13-
3 703(F)(6). *Id.*

4 The court, after “consider[ing] all of the mitigating circumstances without
5 limitation,” sentenced Hooper to death. (*Id.*)

6 **2. PCR proceedings**

7 During his PCR proceedings, Hooper was represented by Philip Seplow. Seplow
8 did not raise a claim of ineffective assistance of counsel at sentencing in his first PCR
9 petition. He did raise such a claim in the second PCR petition, adding that he had
10 performed ineffectively as PCR counsel by failing to raise the claim in the first PCR
11 proceedings. (ROA 1627.) Seplow stated that during the initial PCR proceedings he did
12 not realize the significance of claims of ineffective assistance of counsel at sentencing.
13 He argued that sentencing counsel should have presented evidence that Hooper was loved
14 by his family and friends, that he was an artist and had an excellent institutional record in
15 Illinois, and that he was not an antisocial personality and was capable of rehabilitation.
16 Seplow also argued that trial counsel performed ineffectively by failing to object to the
17 presentence report that was introduced at Hooper’s sentencing. The PCR court denied the
18 claim as procedurally barred. (ROA 1720.)

19 **C. Analysis**

20 **1. Deficient performance**

21 *Strickland* does not require defense counsel to present mitigating evidence at
22 sentencing in every case. *See Wiggins v. Smith*, 539 U.S. 510, 533 (2003); *see also*
23 *Chandler v. United States*, 218 F.3d 1305, 1319 (11th Cir. 2009) (“No absolute duty
24 exists to introduce mitigating or character evidence.”); *Hawkins v. Coyle*, 547 F.3d 540,
25 548 (6th Cir. 2008) (explaining that “a careful reading of *Wiggins* reveals that counsel’s
26 performance will not necessarily be deficient because of a failure to investigate, so long
27 as counsel’s decision not to investigate is reasonable under the circumstance. *Waters v.*
28 *Thomas*, 46 F.3d 1506, 1511 (11th Cir. 1995) (“[T]he lesson to be drawn from our
decisions is not that counsel’s performance is always, or even usually, deficient if counsel

1 fails to present available mitigating circumstance evidence.”). In *Strickland* itself, for
2 example, counsel did not present mitigation evidence. 466 U.S. at 673–75. Counsel did
3 not seek character witnesses or a mental health examination. *Id.* The Court explained that
4 given the overwhelming aggravating factors trial counsel could “reasonably surmise . . .
5 that character and psychological evidence would be of little help.” *Id.* at 699. Instead,
6 based on his knowledge of the sentencing judge, counsel focused on the fact that the
7 defendant accepted responsibility for his crimes. *Id.* at 673. Counsel also argued that the
8 defendant was fundamentally a good man who committed the crimes under extremely
9 stressful circumstances. *Id.* at 674. Pursuing this strategy did not constitute deficient
10 performance. *Id.* at 699.

11 If defense counsel decides not to investigate mitigation, that “particular decision
12 not to investigate must be directly assessed for reasonableness in all the circumstances,
13 applying a heavy measure of deference to counsel’s judgments.” *Id.* at 691; *see Wiggins*,
14 539 U.S. at 521–22 (explaining that “counsel has a duty to make reasonable
15 investigations or to make a reasonable decision that makes particular investigations
16 unnecessary”).

17 In a deposition taken in 1992, during the second round of PCR proceedings,
18 Woods explained the reasoning behind his decision not to present a case in mitigation.
19 First, he believed there was no compelling mitigating evidence to offer:

20 It was clear to me there were no mitigating factors, and almost every
21 aggravating factor listed in the statute was present. So this was a difficult
22 sentencing, given that he really had nothing going for him at sentencing, I
23 didn’t believe.

24 And to put on a mitigation hearing would do two things. One, it
25 would prompt the prosecution to put on an aggravation hearing. And since
26 they could prove every aggravating factor just about, if not all of them, that
27 wouldn’t be good. And he really didn’t have any mitigation. If we came up
28 with any, it would be really Mickey Mouse and his age—I can’t remember
how old he was, but late thirties or something—but anyway, you would
have to be kind of making it up.

I don’t what age means, you know, poor, socioeconomic
background. I mean, my goal was to try to have him not get the death
sentence. And I believe my best chance would be to try to construct an
argument directed specifically at that judge that maybe he might buy rather

1 than put on a completely ineffectual and unpersuasive mitigation hearing
2 just for the record, because it wouldn't have done any good. So that's what
I did.

3 (Doc. 147-1, Ex. 7 at 22–23.)

4 Woods again detailed why he believed it was tactically sound in this case not to
5 present mitigation:

6 Because my goal—I had a choice there. I could just try to protect the
7 record, or I could try to talk the judge out of the death penalty. And I didn't
8 think I could do both. I could aggravate the situation with the judge by
coming up with—There were no mitigating factors. That's the bottom line.
There were none.

9 I could try to make up something or come up with some phony deal
10 that he would not buy, or I could lay it on the line on a different level and
see if I could persuade him.

11 (Id. at 23–24.) Woods reiterated that he thought his “best shot” was not to present a case
12 in mitigation. (Id. at 24.)

13 Woods further explained that in the absence of strong mitigating evidence, the best
14 chance to avoid a death sentence was to achieve an acquittal:

15 We were faced with a difficult proposition here. The evidence that
16 would come forward would not be evidence that I could see could—that
17 you could use in any way to help your mitigation case. As far as the defense
18 case that we would put it, that it would help us in mitigation, I didn't see it
either. I don't know what it would have been.

19 I mean, you had two guys [Hooper and Bracy] who, actually, were
20 not unintelligent. They were both, I thought, bright guys, not well-educated,
21 obviously, but bright guys. And neither of them—their actions were done,
knowing exactly what they were doing without the influence of anything.
So I just didn't see that at all.

22 I thought our only chance we would have would be to beat the case.
23 That was a rather daunting prospect, too if you look at the evidence. Just
24 about anything you could have against you as evidence, they had when we
25 started. And they had everything. And we got almost all of it precluded at
the trial. And the fact that the jury was out three and a half days, given what
we started with, I considered a great victory.

26 (Id. at 29–30.)

1 Woods further stated that he would have encouraged Hooper to accept “in a
2 minute” any plea offer that would have avoided a death sentence, but the State did not
3 make such an offer. (*Id.* at 30–31.)

4 Respondents argue that Woods’ decision not to present mitigating evidence was
5 reasonable and based on tactical considerations. (Doc. 152 at 18–20.) According to
6 Respondents, “Woods not only reasonably believed that the sentencing judge would not
7 have been persuaded by any good character evidence he presented, he also reasonably
8 concluded that such a presentation would have prompted the State to respond with details
9 of Hooper’s extensive criminal record and activities to show his bad character.” (*Id.* at
10 19–20.)

11 Hooper counters that Woods’ decision not to present mitigating evidence was
12 unreasonable and uninformed because he had not investigated Hooper’s background.
13 (Doc. 147 at 14–17.) Hooper also contends that Woods misapprehended the nature of
14 capital sentencing proceedings by, among other errors, believing that the presentation of
15 mitigating evidence would allow the State to present a case in aggravation and by
16 misunderstanding the significance of humanizing mitigation evidence. (*Id.* at 16.) Hooper
17 also argues that because the court was already aware of his criminal record through the
18 presentence report, there was no risk in presenting humanizing mitigation evidence. (*Id.*)

19 “[T]he failure to present mitigating evidence during the penalty phase of a capital
20 case, where there are no tactical considerations involved, constitutes deficient
21 performance.” *Smith v. Stewart*, 189 F.3d 1004, 1008–09 (9th Cir. 1999). Here, however,
22 the record shows that Woods’ decision not to present mitigating evidence was based on
23 tactical considerations, as Woods described in his deposition. Moreover, it is apparent
24 that Woods had some knowledge of the available mitigating evidence, primarily about
25 Hooper’s socioeconomic background. Woods traveled two or three times to Chicago,
26 Hooper’s hometown. His investigator also went to Chicago.

27 Assuming, however, that Woods’ investigation was not “thorough,” *Strickland*
28 made it clear that “strategic choices made after less than complete investigation are

1 reasonable precisely to the extent that reasonable professional judgments support the
2 limitations on investigation.” 466 U.S. at 690–91.

3 Woods’ decision not to present mitigating evidence was based on his assessment
4 of the strength of the available evidence as weighed against the aggravating factors and
5 the perceived risk of opening the door to damaging rebuttal evidence, and his belief that
6 he could make a more persuasive case for leniency by trying to persuade the judge it was
7 not necessary to sentence Hooper to death when an Illinois court had already done so.

8 Hooper is correct that under Arizona law in every capital sentencing the State
9 presents a case in aggravation, regardless of whether the defendant offers mitigating
10 evidence. Hooper argues that the trial court was aware of his criminal record, so the
11 presentation of mitigating information about his background and character would not
12 necessarily have opened the door to additional, damaging rebuttal evidence. *See,*
13 *e.g., Burger v. Kemp*, 483 U.S. 776 (1987) (concluding that failure to introduce character
14 evidence was effective performance because witnesses could have been subjected to
15 harmful cross-examination or invited other damaging evidence); *Darden v.*
16 *Wainwright*, 477 U.S. 168 (1986) (holding that trial counsel’s decision to forego the
17 presentation of mitigating evidence and rely on a plea of mercy was not constitutionally
18 deficient because counsel reasonably determined that present mitigating evidence would
19 open the door to damaging rebuttal).

20 The presentence report set forth Hooper’s lengthy criminal record and noted that
21 “in September of 1981 [Hooper] received the death sentence in Illinois for his part in the
22 execution-style slaying of three men on November 13, 1980.” (Doc. 147-1, Ex. 11.) The
23 presentence report established the bare fact of the crimes. However, further details of the
24 execution-style killings in Illinois, committed just six weeks before the Arizona murders,
25 and Hooper’s long history of criminal violence, could have been used to rebut any
26 evidence of good character or the mitigating effects of a deprived childhood. *See State v.*
27 *Pandeli*, 215 Ariz. 514, 528–29, 161 P.3d 557, 571–72 (2007) (finding that the
28 underlying facts of previous murder admissible to rebut mitigation evidence of
defendant’s mental health and to show defendant not entitled to leniency).

1 Woods' approach to sentencing, when viewed with proper deference, did not fall
2 below the standard set forth in *Strickland*. "The test has nothing to do with what the best
3 lawyers would have done. Nor is the test even what most good lawyers would have done.
4 We ask only whether some reasonable lawyer at the trial could have acted, in the
5 circumstances, as defense counsel acted at trial." *White v. Singletary*, 972 F.2d 1218,
6 1220 (11th Cir. 1992).

7 Hooper was a 35-year-old "hired killer," *Hooper*, 145 Ariz. at 551, 703 P.2d at
8 495, who, just weeks before travelling to Phoenix to commit the Redmond murders,
9 committed another set of execution-style killings. With knowledge of those facts, it was
10 not unreasonable for Woods to doubt the value of mitigating evidence concerning
11 Hooper's childhood in Chicago, and to decide on a different approach in seeking to
12 convince the judge not to sentence Hooper to death. As discussed next, even if Woods'
13 performance at sentencing was deficient, Hooper cannot show prejudice.

14 **2. Prejudice**

15 To determine whether a defendant was prejudiced by counsel's deficient
16 performance, "the question is whether there is a reasonable probability that, absent the
17 errors, the sentencer . . . would have concluded that the balance of aggravating and
18 mitigating circumstances did not warrant death." 466 U.S. at 695. In assessing prejudice
19 the court reweighs the aggravating evidence against the totality of the mitigating
20 evidence. *Wiggins v. Smith*, 539 U.S. 510, 534 (2003). The "totality of the available
21 evidence" includes "both that adduced at trial, and the evidence adduced" in subsequent
22 proceedings. *Id.* at 536

23 In arguing that he was prejudiced by counsel's performance, Hooper cites
24 "classic" mitigating information about his background that Woods should have presented
25 at sentencing. (Doc. 147 at 20.) This information is set forth in exhibits, including
26 interview notes and memos, attached to the pending motion. (Doc. 147-1, Ex's 13-31.)

27 Hooper grew up in Chicago in a segregated neighborhood where he was "heavily
28 influenced by his impoverished, dangerous, and violent surroundings." (*Id.* at 22.)
Hooper needed to develop toughness to survive in those surroundings. He learned to

1 defend himself and was involved in fights to protect himself and his siblings. (*Id.* at 22–
2 23, 25.) In one of these fights, at age 12, Hooper was knocked unconscious by blows
3 from an ax handle. (*Id.* at 24.)

4 His father was a strict disciplinarian, who whipped Hooper with a belt when he got
5 into trouble. (*Id.* at 23.) There was verbal as well as physical violence in the household.
6 (*Id.* at 23–24.)

7 At around age 13, Hooper’s conduct resulted in him being sent to a series of
8 reformatories and juvenile detention centers. One of the institutions had a “sordid
9 history”; Hooper was mistreated and “had to fight as a means of survival.” (*Id.* at 26.)

10 At age 15, Hooper began carrying a gun. (*Id.* at 27.) Although he did not
11 “formally” join a gang, he began hanging out with the “wrong crowd.” (*Id.*) At age 17, he
12 began drinking, and continued drinking for several years. (*Id.*) He became angry when
13 intoxicated. (*Id.*)

14 Hooper had difficulty finding employment. (*Id.* at 28.) He spent most of his adult
15 life in the Illinois prison system. (*Id.*) He was regarded as a cooperative and respectful
16 inmate. (*Id.* at 28–29.) Hooper was a “loving and caring brother” and a “concerned
17 friend.”³ (*Id.* at 29.)

18 Dr. Robert Heilbronner, a neuropsychologist, reviewed records and evaluated
19 Hooper in 2011. (Doc. 147-1, Ex. 13.) He opined, based on the verbal-performance
20 discrepancy in Hooper’s IQ scores, that “Hooper demonstrated deficits on select
21 objective measures of brain function” and this impairment was present in 1981.⁴ (*Id.* at 4–
22 5.) In June 2015, Dr. Heilbronner completed his evaluation by administering additional
23 neuropsychological tests. (Doc. 157-1, Ex. 27.) The test results did not reveal the cause of
24 the discrepancy between Hooper’s verbal and performance scores. (*Id.*) Dr. Heilbronner

25 ³ The record contains contradictory evidence about Hooper’s background. His
26 brother stated that their parents did not punish them, that the neighborhood they grew up
27 in was not overly violent, and that Hooper was aggressive and prone to rages. (Doc. 147-
1, Ex. 18.)

28 ⁴ Dr. Heilbronner determined that Hooper had an overall IQ of 92 (average), with
verbal intellectual abilities score of 103 (average) and a nonverbal, performance score of
82 (borderline to low average). (Doc. 157-1, Ex. 27.)

1 opined, however, that the evidence of brain impairment would have been “different” in
2 1981 than it is now. (*Id.*)

3 Finally, Dr. James Garbarino, a developmental psychologist, in a declaration from
4 2015, opined that as a child Hooper developed a “war zone mentality” due to the violence
5 of his surroundings. (*Id.*, Ex. 28 at 6.) This mentality includes hyper-vigilance and “a
6 high probability of responding to threats with aggression.” (*Id.*) This mindset “played a
7 role in the chronically anti-social and violent behavior that characterized his adolescence
8 and early adulthood.” (*Id.* at 11.)

9 The Court finds there is not a reasonable probability that Hooper would have
10 received a different sentence if Woods had offered such evidence to the trial judge.
11 Several factors support this conclusion. First, the aggravating factors were especially
12 strong. The Arizona Supreme Court has explained, for example, that “when a ‘hired hit’
13 has taken place, the (F)(5) aggravator has substantial weight.” *State v. Harrod*, 218 Ariz.
14 268, 284, 183 P.3d 519, 535 (2008).

15 Next, given Hooper’s age at the time of the murders and the fact that he served as
16 a hired killer, mitigating evidence relating to his childhood in Chicago would have had
17 minimal value. In *State v. Hampton*, 213 Ariz. 167, 140 P.3d 950 (2006), the Arizona
18 Supreme Court noted that the defendant had a “horrendous childhood”; his mother,
19 biological father, and three stepfathers were all alcoholics; his fathers abused him
20 verbally and physically; his family moved constantly, and he spent time in six different
21 foster homes; his older brother sexually molested him and injected him with heroin when
22 Hampton was 11 years old; he became addicted to methamphetamine and cocaine before
23 age 20, and he used meth a few hours before the murders; he suffered numerous mental
24 health problems, and first attempted suicide at age 11. *Id.* at 184–85, 140 P.3d at 967–68.

25 The court nevertheless affirmed Hampton’s death sentence, explaining that a
26 “difficult family background, in and of itself, is not a mitigating circumstance” sufficient
27 to mandate leniency in every capital case. *Id.* at 185, 140 P.3d at 968 (citation omitted).
28 The court also noted “Hampton’s troubled upbringing is entitled to less weight as a
mitigating circumstance because he has not tied it to his murderous behavior. Further,

1 Hampton was thirty years old when he committed his crimes, lessening the relevance of
2 his difficult childhood.” *Id.* Finally, because Hampton committed three homicides, the
3 court found the mitigation evidence not sufficiently substantial to call for leniency. *Id.*

4 Hooper’s mitigation evidence is not as compelling as that detailing Hampton’s
5 “horrendous” childhood. He came from an intact family, and there is no evidence that he
6 was sexually abused or exposed to drug use as a child. Nor is there evidence that Hooper
7 experienced severe mental health problems or was under the influence of drugs or alcohol
8 when he committed the murders. *See Allen v. Woodford*, 395 F.3d 979, 1007 (9th Cir.
9 2005) (explaining that the omitted mitigation evidence was not exculpatory and did not
10 diminish the petitioner’s culpability; “[n]one of the testimony portrays a person whose
11 moral sense was warped by abuse, drugs, mental incapacity, or disease or who acted out
12 of passion, anger or other motive unlikely to reoccur”); *Apelt v. Ryan*, 878 F.3d 800, 834
13 (9th Cir. 2017) (“This conclusion [that the petitioner was not prejudiced by sentencing
14 counsel’s performance] is all the more reasonable as none of the proffered mitigating
15 evidence excuses Apelt’s callousness, nor does it reduce Apelt’s responsibility for
16 planning and carrying out the murder.”).

17 In addition, as noted, Hooper was 35 years old at the time of the killings; evidence
18 of a difficult childhood therefore lacks weight as a mitigating circumstance. *See*
19 *Hampton*, 213 Ariz. at 185, 140 P.3d at 968; *Pandeli*, 215 Ariz. at 532, 161 P.3d at 575
20 (“Pandeli’s difficult childhood and extensive sexual abuse, while compelling, are not
21 causally connected to the crime. Moreover, Pandeli murdered [the victim] when he was
22 in his late twenties, reducing the relevance of his traumatic childhood.”); *State v.*
23 *Bocharski*, 218 Ariz. 476, 499, 189 P.3d 403, 426 (2008) (“Bocharski committed this
24 offense when he was thirty-three years old, lessening the relevance of abuse and neglect
25 that occurred during his childhood.”).

26 The United States Supreme Court has explained that “evidence about the
27 defendant’s background and character is relevant because of the belief, long held by this
28 society, that defendants who commit criminal acts that are attributable to a disadvantaged
background . . . may be less culpable.” *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989)

1 (quoting *California v. Brown*, 479 U.S. 538, 545 (1987)), *abrogated on other grounds by*
2 *Atkins v. Virginia*, 536 U.S. 304 (2002). However, in contrast to cases such as *Wiggins*,
3 539 U.S. 510; *Rompilla v. Beard*, 545 U.S. 374 (2005); and *Porter v. McCollum*, 558
4 U.S. 30 (2009), where counsel’s failure to investigate mitigating evidence prejudiced the
5 defendant, the omitted mitigation evidence about Hooper’s background is relatively
6 “weak.” *Landrigan v. Schriro*, 550 U.S. 465, 481 (2005).⁵ For example, in *Wiggins*,
7 counsel failed to present evidence that the defendant suffered consistent abuse during the
8 first six years of his life, was the victim of “physical torment, sexual molestation, and
9 repeated rape during his subsequent years in foster care,” was sometimes homeless, and
10 had diminished mental capacities. 539 U.S. at 535. In *Rompilla*, counsel failed to present
11 evidence that his client was beaten by his father with fists, straps, belts, and sticks; that
12 his father locked him and his brother in a dog pen filled with excrement; and that he grew
13 up in a home with no indoor plumbing and was not given proper clothing. 545 U.S. at
14 391–92. In *Porter*, trial counsel neglected to present mitigating evidence about “(1)
15 Porter’s heroic military service in two of the most critical—and horrific—battles of the
16 Korean War, (2) his struggles to regain normality upon his return from war, (3) his
17 childhood history of physical abuse, and (4) his brain abnormality, difficulty reading and
18 writing, and limited schooling.” 558 U.S. at 41.

19 As outlined above, this type of substantial mitigation evidence does not exist for
20 Hooper, and the evidence he has offered does little if anything to exculpate or explain his
21 actions as a hired killer. The execution-style killings Hooper carried out in his mid-30s
22 are not attributable to the disadvantaged background he experienced as a child in
23 Chicago. *Penry*, 492 U.S. at 319. Even if, as Hooper argues, he needed to develop
24 toughness and a willingness to defend himself in order to survive his environment, those
25 characteristics are unrelated to his later role as a hired killer who committed multiple

26 ⁵ This “weak” evidence included Landrigan’s exposure to alcohol and drugs in
27 utero, abandonment by his biological mother, his own drug and alcohol abuse, his
28 family’s history of violence, and a possible genetic predisposition to violence. 550 U.S. at
480. Nevertheless, the Court concluded that there was no reasonable probability that
presentation of the additional evidence would have changed the outcome at sentencing.
Id. at 481.

1 murders as part of a business transaction. Again, the mitigating value of the evidence is
2 reduced by the lack of a causal connection between Hooper's childhood in a violent
3 neighborhood and the premeditated and calculated nature of the crimes.⁶

4 For the same reason the opinions of Drs. Heilbronner and Garbarino have little
5 mitigating value. Dr. Heilbronner opined that Hooper suffered from brain impairment at
6 the time of the murders. There is no indication that such impairment, if it existed, bore
7 any relationship to the premeditated and calculated murders Hooper committed. Dr.
8 Garbarino drew a connection between Hooper's childhood in the "war zone" of Chicago
9 and his violent behavior as an adolescent and young adult. Hypervigilance of the type
10 ascribed to Hooper by Dr. Gabarino does not explain the Hooper's conduct as a hired
11 killer who flew from Chicago to Phoenix to rob and shoot three bound victims in their
12 own home.

13 In *Apelt*, the petitioner carried out a scheme by which he convinced a woman to
14 marry him, obtained an insurance policy on her life, and then murdered her to collect the
15 proceeds. 878 F.3d at 833. The Ninth Circuit found that, given the calculated and
16 depraved nature of the crime, Apelt was not prejudiced by counsel's performance at
17 sentencing, even though counsel failed to present evidence that Apelt's father beat and
18 sexually abused him, that Apelt was developmentally delayed and attended a special
19 learning school, that his family lived in extreme poverty, and that he was sent to a
20 psychiatric institution after a suicide attempt. *Id.* at 823–24. The court also noted that
21 "presenting Apelt's upbringing and activities in Germany to explain how Apelt became a
22 calculating killer arguably could weigh in favor rather than against the death penalty." *Id.*
23 at 834 (citing *Cullen v. Pinholster*, 563 U.S. 170, 201 (2011)).

24 Hooper, by contrast, had less compelling mitigating evidence to offer, while
25 committing two "premeditated and calculated" murders and attempting a third. Also

26
27 ⁶ See *State v. Newell*, 212 Ariz. 389, 405, 132 P.3d 833, 849 (2006) (explaining
28 that mitigating evidence must be considered regardless of whether there is a nexus
between the mitigating factor and the crime, but the lack of a causal connection may be
considered in assessing the weight of the evidence); *Eddings v. Oklahoma*, 455 U.S. 104,
114–15 (1982).

1 balanced against this mitigating evidence were the aggravating factors arising from the
2 three Illinois murders, as well as the pecuniary gain and cruel, heinous or depraved
3 aggravating factors.

4 Finally, the Court addresses Hooper's argument that the prejudice analysis
5 concerning trial and PCR counsel's deficient performance must take into account the fact
6 that the Illinois murder convictions were subsequently vacated. According to Hooper,
7 "[p]rejudice must be reckoned now in light of the altered landscape of the case, *i.e.*, one
8 in which the two weightiest aggravating factors no longer exist." (Doc. 147 at 46.)
9 Respondents counter that the "invalidation of [Hooper's] Illinois convictions in 2014 has
10 no bearing on whether his trial and PCR lawyers performed deficiently in the 1982
11 sentencing and 1989 PCR proceedings, nor on whether there was a reasonable likelihood
12 of a different result in those proceedings absent any allegedly deficient performance."
13 (Doc. 152 at 26.)

14 Hooper relies on *Johnson v. Mississippi*, 486 U.S. 578 (1988), where the Supreme
15 Court held that the Eighth Amendment requires reexamination of a death sentence that
16 was based in part on a prior felony conviction which was set aside after the capital
17 sentence was imposed, and *Clemons v. Mississippi*, 494 U.S. 738 (1990), where the Court
18 held that a state appellate court can affirm a death sentence based on an invalid
19 aggravating factor only after conducting either a harmless error review or re-weighing the
20 mitigating evidence against the remaining valid aggravating factors. These principles are
21 the basis of Claim 16, which the Court discusses below.

22 Hooper offers no support for his assertion that the holdings in *Johnson* and
23 *Clemons* are relevant to a claim of ineffective assistance of counsel under the Sixth
24 Amendment. Hooper concedes that trial counsel's performance must be judged based "on
25 the facts of the particular case, viewed as of the time of counsel's
26 conduct." *Strickland*, 466 U.S. at 690. He contends, however, that prejudice must be
27 evaluated "in the present." (Doc. 157 at 25.)

28 Hooper's argument is unpersuasive. To demonstrate prejudice, Hooper must
"show that there is a reasonable probability that, *but for counsel's unprofessional errors*,

1 the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694
2 (emphasis added). Hooper does not allege that trial counsel’s performance was deficient
3 based on his handling of the prior convictions that formed the basis of two aggravating
4 factors.

5 The Supreme Court has explained that “the ‘prejudice’ component of
6 the *Strickland* test . . . focuses on the question whether counsel’s deficient performance
7 renders the result of the trial unreliable or the proceeding fundamentally
8 unfair.” *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993) (citing *Strickland*, 466 U.S. at
9 687). “Unreliability or unfairness does not result if the ineffectiveness of counsel does not
10 deprive the defendant of any substantive or procedural right to which the law entitles
11 him.” *Id.*

12 Nothing trial counsel did with respect to the prior convictions deprived Hooper of
13 his Sixth Amendment rights. The “altered landscape” of the case resulting from the
14 vacated convictions is not relevant in assessing whether Hooper was prejudiced by
15 counsel’s performance at sentencing.

16 **D. Conclusion**

17 Trial counsel did not perform ineffectively at sentencing. PCR counsel, therefore,
18 was not ineffective for failing to raise a claim of ineffective assistance of trial counsel.
19 *Sexton*, 679 F.3d at 1161; *see Clabourne*, 745 F.3d at 377. Because Hooper has not
20 shown that PCR counsel was ineffective, he has not demonstrated cause to excuse his
21 procedural default. Claim 4 remains procedurally defaulted and barred from federal
22 review.

23 **CLAIM 16**

24 The remand order directed the Court to reconsider its order denying leave to
25 amend the petition to include Claim 16, alleging that Hooper’s Arizona death sentence is
26 based on invalid Illinois convictions.⁷ This Court previously denied Hooper’s motion to
27 amend as futile. (Doc. 114.)

28 ⁷ In 2013, the United States District Court for the Northern District of Illinois

1 **A. Applicable legal standards**

2 Although leave to amend a petition for habeas corpus “shall be freely given when
3 justice so requires,” Fed. R. Civ. P. 15(a), futility of amendment may justify the denial of
4 leave to amend. *See Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). “A
5 determination of futility contemplates whether, upon de novo review, the amendment
6 could present a viable claim on the merits for which relief could be granted.” *Murray v.*
7 *Schriro*, 745 F.3d 984, 1015 (9th Cir. 2014).

8 Claim 16 is governed by the provisions of the AEDPA, the Antiterrorism and
9 Effective Death Penalty Act of 1996, 28 U.S.C. § 2254. Pursuant to 28 U.S.C. §
10 2254(d)(1), a petitioner is not entitled to habeas relief on any claim adjudicated on the
11 merits in state court unless the state court’s adjudication “resulted in a decision that was
12 contrary to, or involved an unreasonable application of, clearly established Federal law,
13 as determined by the Supreme Court of the United States.”

14 The Supreme Court has emphasized that “an *unreasonable* application of federal
15 law is different from an *incorrect* application of federal law.” *Williams*, 529 U.S. at 410.
16 In *Harrington v. Richter*, 562 U.S. 86 (2011), the Supreme Court clarified that under §
17 2254(d), “[a] state court’s determination that a claim lacks merit precludes federal habeas
18 relief so long as ‘fairminded jurists could disagree’ on the correctness of the state court’s
19 decision.” *Id.* at 101. Accordingly, to obtain habeas relief, a petitioner “must show that
20 the state court’s ruling on the claim being presented in federal court was so lacking in
21 justification that there was an error well understood and comprehended in existing law
22 beyond any possibility for fairminded disagreement.” *Id.* at 103.

23 **B. Additional background**

24 At sentencing, the trial court determined that the aggravating factors set forth in
25 A.R.S. § 13-703(F)(1) and (2) were satisfied by Hooper’s prior convictions for homicide,
26 armed robbery, and aggravated kidnapping. The court found three additional aggravating
27 circumstances: that Hooper knowingly created a grave risk of death to another person,
28 §13-703(F)(3); that he committed the offense as consideration for the receipt, or in
granted habeas relief as to Hooper’s Illinois convictions. (*See* Doc. 147-1, Ex. 1.)

1 expectation of the receipt, of anything of pecuniary value, (F)(5); and that he committed
2 the offense in an especially heinous, cruel or depraved manner, (F)(6).

3 On direct appeal, the Arizona Supreme Court concluded that the (F)(3) factor was
4 not present but affirmed the death sentence. *Hooper*, 145 Ariz. at 550–51, 703 P.2d at
5 494–95. With respect to mitigating evidence, the court explained:

6 The trial court also considered all possible mitigating circumstances and
7 found none to exist. We agree. At the sentencing hearing, defendant's
8 counsel argued as a mitigating circumstance that the death penalty was
9 immoral. Defendant's opposition to the death penalty, however, is not a
10 mitigating circumstance sufficiently substantial to outweigh the aggravating
circumstances. Reviewing the record, we find no other mitigating

11 *Id.* at 551, 703 P.2d at 495.

12 In Claim 16 of his amended petition, Hooper alleged that his Illinois convictions
13 would likely be overturned because the trial judge was subsequently convicted of taking
14 bribes while trying cases. (Doc. 29 at 9; Doc. 31 at 59). Hooper argued that if his Illinois
15 convictions were overturned, his Arizona sentence would violate the Eighth Amendment
16 because the sentencing court relied upon those convictions in finding the (F)(1) and
17 (F)(2) aggravating circumstances. (*Id.*)

18 This Court determined that Claim 16 was unexhausted. (Doc. 32.) Hooper
19 withdrew the claim and the Court stayed these proceedings while Hooper exhausted the
20 claim in state post-conviction proceedings. After Hooper filed his PCR petition, the PCR
21 court stayed its proceedings while Hooper sought post-conviction relief in Illinois. (Doc.
22 106, Ex. C.) This Court later vacated its stay, directing Hooper to move for leave to
23 amend his habeas petition once the claim was exhausted. (Doc. 55.)

24 The PCR court ultimately determined that Hooper's claim that the reversal of his
25 Illinois convictions would invalidate his death sentence was not colorable. (Doc. 106, Ex.
26 C at 2.) The court explained that even if the Illinois convictions were invalidated, two
27 aggravating factors would remain. (*Id.*)

28 Next, the PCR court noted that the Arizona Supreme Court, agreeing with the trial
court, found that no mitigating circumstances existed. (*Id.*) The PCR court then

1 concluded that the invalidity of Hooper's Illinois convictions had no effect on his
2 Arizona death sentence:

3 [E]ven if the Illinois convictions are subsequently declared invalid, there
4 remain two valid aggravators (§ 13-703(F)(5) and (6)) and no mitigators.
5 Pursuant to § 13-703(E) (1982), the court was required to impose the death
6 penalty if it found one or more aggravating circumstances and that there
7 were no mitigating circumstances sufficiently substantial to call for
leniency. The fact that there are only two aggravators rather than five does
not affect the resulting death sentence in this case.

8 (*Id.*) The Arizona Supreme Court summarily denied review. (Doc. 106, Ex. J.)

9 Hooper then filed his motion to amend his habeas petition to include Claim 16.
10 (Doc. 106.) The Court denied the motion on the ground that amendment would be futile.
11 (Doc. 114.) Hooper cited *Brown v. Sanders*, 546 U.S. 212 (2006), and *Clemons*, 494 U.S.
12 738. The Court rejected Hooper's argument under *Sanders* that his death sentence
13 violated the Eighth Amendment because the sentencer considered two invalid
14 aggravating factors. The Court found that *Sanders* was not clearly established federal law
15 at the time of the PCR court's decision in 2005. (*Id.* at 6-7.) The Court also concluded
16 even if *Sanders* was the applicable clearly established law, the PCR court's ruling was
17 not contrary to or an unreasonable application of the case because the state court, in
18 denying Hooper's claim, reweighed the aggravation and mitigation. (*Id.* at 8.)

19 Furthermore, this Court found that the state court complied with *Stringer v. Black*,
20 503 U.S. 222 (1992), by reweighing the aggravating and mitigating factors and finding
21 that "the remaining aggravating evidence was weightier than the mitigation presented at
22 sentencing." (*Id.* at 7.) Finally, the Court rejected Hooper's contention that the state court
23 violated *Clemons* by automatically affirming without reweighing the aggravation and
24 mitigation: "The PCR court's upholding of the death sentence was not automatic because
25 it believed that death was the 'required' sentence but because it weighed the remaining
26 aggravation evidence against the mitigation evidence and determined that the mitigation
27 was not sufficiently substantial to warrant leniency." (*Id.* at 8-9.)
28

1 In his supplemental brief, Hooper raises several grounds for the Court to
2 reconsider its denial of leave to amend. He contends that the PCR court “did not engage
3 in harmless-error analysis” or any “meaningful ‘independent re-weighing.’” (Doc. 147 at
4 51.) He asserts that the PCR court did not reweigh the remaining aggravating factors and
5 mitigating circumstances but instead “automatically” affirmed the death sentence. (*Id.*)
6 He also contends that the PCR court erroneously determined that the trial court and
7 Arizona Supreme Court had found there were no mitigating circumstances, and based on
8 this error found that a death sentence was required. (*Id.* at 53–54.) Finally, Hooper argues
9 that under *Stringer* only a reviewing court can perform the reweighing or harmless error
10 analysis. (*Id.* at 56.)

11 These arguments do not change the Court’s previous analysis. First, reweighing or
12 harmless-error analysis by the PCR court was appropriate. As the Supreme Court
13 explained in *Stringer*, when a sentencer has relied on an invalid aggravating factor,
14 “constitutional harmless-error analysis or reweighing at *the trial or appellate level*” is
15 necessary to ensure that the defendant received an individualized sentence. 503 U.S. at
16 232 (emphasis added); see *Richmond v. Lewis*, 506 U.S. 40, 49 (1992) (“Where the death
17 sentence has been infected by a vague or otherwise constitutionally invalid aggravating
18 factor, the state appellate court or some other state sentencer must actually perform a new
19 sentencing calculus.”); *Sanders*, 546 U.S. at 217.

20 The PCR court did not err in its assessment of the mitigating evidence or err in
21 finding a death sentence was required. The Arizona Supreme Court found that the only
22 argument presented at sentencing—that the death penalty is immoral—was not a
23 mitigating circumstance sufficiently substantial to outweigh the aggravating
24 circumstances. *Hooper*, 145 Ariz. at 551, 703 P.2d at 495. The PCR court repeated that
25 finding when it explained there “were no mitigating circumstances sufficiently substantial
26 to call for lenience.” (Doc. 106, Ex. C at 2.)

27 The PCR court then explained that under A.R.S. § 13–703(E), the sentencer “shall
28 impose a sentence of death if [it] finds one or more of the aggravating circumstances . . .
and then determines that there are no mitigating circumstances sufficiently substantial to

1 call for leniency.” (*Id.*) The court found that with the two remaining aggravating factors
2 and the lack of sufficiently substantial mitigating circumstances, death was the
3 appropriate sentence. (*Id.* at 2–3.) The PCR court’s application of § 13-703(E) did not
4 violate Hooper’s rights. Accordingly, the PCR court’s ruling was neither contrary to nor
5 an unreasonable application of clearly established federal law under § 2254(d)(1).

6 Finally, in *Walton v. Arizona*, the Supreme rejected the claim that Arizona’s death
7 penalty statute is impermissibly mandatory and creates a presumption in favor of the
8 death penalty because it provides that the death penalty “shall” be imposed if one or more
9 aggravating factors are found and mitigating circumstances are insufficient to call for
10 leniency. 497 U.S. 639, 651–52 (1990), *overruled on other grounds*, *Ring v. Arizona*, 536
11 U.S. 584 (2002); *see Kansas v. Marsh*, 548 U.S. 163, 173–74 (2006) (relying on *Walton*
12 to uphold Kansas’ death penalty statute, which directs imposition of the death penalty
13 when the state has proved that mitigating factors do not outweigh aggravators); *Smith v.*
14 *Stewart*, 140 F.3d 1263, 1272 (1998) (summarily rejecting challenges to the “mandatory”
15 quality of Arizona’s death penalty statute).

16 The Court again finds that amending the petition to include Claim 16 would be
17 futile because the claim is not viable.

18 **EVIDENTIARY DEVELOPMENT**

19 Hooper argues that he is entitled to evidentiary development, including expansion
20 of the record, discovery, and an evidentiary hearing, to support his argument that the
21 procedural default of Claim 4 is excused under *Martinez*. (Doc. 147 at 35.) He seeks to
22 “present testimony from mental health experts, sentencing and post-conviction counsel,
23 prior investigators, and lay witnesses in order to prove that the prior representation was
24 deficient and that there was a reasonable probability of a life sentence.” (*Id.* at 37–38.)

25 Respondents do not object to expanding the record to include materials relevant to
26 the *Martinez* issue. (Doc. 152 at 27–28.) Accordingly, the Court will expand the record to
27 include the materials attached to Hooper’s brief as well as the exhibits attached to his
28 reply. (Docs. 147-1, Ex’s 1–31; 157-1, Ex’s 27, 28.) The Court has reviewed and fully
considered the materials in analyzing the remanded issues.

1 Respondents do, however, oppose Hooper's requests for discovery and an
2 evidentiary hearing. They contend that the Court can adjudicate the *Martinez* issue on the
3 expanded record, that Claim 4 is not colorable, and that Hooper has not shown good
4 cause for discovery. (*Id.* at 28–29.) The Court agrees.

5 The court in *Detrich* explained that for claims to which *Martinez* applies, “the
6 district court should allow discovery and hold an evidentiary hearing where appropriate
7 to determine whether there was ‘cause’ under *Martinez* for the state-court procedural
8 default and to determine, if the default is excused, whether there has been trial-counsel
9 IAC.” 740 F.3d at 1246. Here, discovery and an evidentiary hearing are not necessary.
10 The exhibits submitted by Hooper include the deposition of trial counsel Woods and a
11 declaration by PCR counsel Seplow, both of which address the issue of ineffective
12 assistance of counsel. (Doc. 147-1, Ex’s 7, 12.) They also include information obtained
13 from Hooper’s brother and sister and other people who knew Hooper during his youth in
14 Chicago. (*Id.*, Ex’s 18–23.) This material is sufficient for the Court to evaluate the
15 performance of trial and PCR counsel for purposes of *Martinez*.

16 Hooper requests the opportunity to depose “the major actors who support his
17 claim,” including trial counsel Woods and PCR counsel Seplow, as well as co-defendant
18 Bracy’s trial and PCR counsel. (Doc. 147 at 143.)

19 Rule 6 of the Rules Governing Section 2254 Cases provides that:

20 A judge may, for good cause, authorize a party to conduct discovery under
21 the Federal Rules of Civil Procedure and may limit the extent of discovery.
22 . . . A party requesting discovery must provide reasons for the request. The
request must also include any proposed interrogatories and requests for
admission, and must specify any requested documents.

23 R. 6(a), (b), Rules Governing Sec. 2254 Cases.

24 Hooper fails to show good cause for the requested discovery. His request to
25 depose the “major actors” lacks the specificity required by Rule 6. Hooper does not
26 allege specific, relevant facts that might be found in the requested depositions. Moreover,
27 as noted, the record contains the deposition of trial counsel and a declaration by PCR
28 counsel. (Doc. 147-1, Ex’s 7, 12.) Additional depositions of the same parties on the same

1 issues are not necessary for Hooper to develop this claim. *See Dung The Pham v.*
2 *Terhune*, 400 F.3d 740, 743 (9th Cir. 2005) (explaining that a district court abuses its
3 discretion by failing to allow discovery that is essential for the petitioner to fully develop
4 his claim).

5 Next, having reviewed the entire record, including the evidence presented by
6 Hooper in his supplemental *Martinez* brief, the Court concludes that an evidentiary
7 hearing is not warranted. Rule 8(a), Rules Governing Sec. 2254 Cases. There are no
8 contested facts concerning Hooper's counsel, and Hooper has failed to indicate what
9 evidence he seeks to develop. Further, the Court has found Claim 4 without merit on the
10 facts alleged. *See Sexton*, 679 F.3d at 1161 (finding the record "sufficiently complete"
11 with respect to underlying ineffective assistance of trial counsel claim); *cf. Dickens*, 740
12 F.3d at 1321 (explaining that "a district court may take evidence to the extent necessary"
13 (emphasis added)). Thus, the Court denies Hooper's request to hold an evidentiary
14 hearing.

15 **CERTIFICATE OF APPEALABILITY**

16 Pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure, an applicant
17 cannot take an appeal unless a certificate of appealability has been issued by an
18 appropriate judicial officer. Rule 11(a) of the Rules Governing Section 2254 Cases
19 provides that the district judge must either issue or deny a certificate of appealability
20 when it enters a final order adverse to the applicant. If a certificate is issued, the court
21 must state the specific issue or issues that satisfy 28 U.S.C. § 2253(c)(2).

22 Under § 2253(c)(2), a certificate of appealability may issue only when the
23 petitioner "has made a substantial showing of the denial of a constitutional right." This
24 showing can be established by demonstrating that "reasonable jurists could debate
25 whether (or, for that matter, agree that) the petition should have been resolved in a
26 different manner" or that the issues were "adequate to deserve encouragement to proceed
27 further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

28 The Court finds that reasonable jurists could debate its resolution of the remanded
claims.

1 **CONCLUSION**

2 Based on the foregoing,


3 **IT IS ORDERED** that Claim 4 is **DENIED** as procedurally barred.

4 **IT IS FURTHER ORDERED** that Hooper's request to amend his petition to
5 include Claim 16 is **DENIED**.

6 **IT IS FURTHER ORDERED** that Hooper's request to expand the record with
7 the materials attached to his supplemental brief and reply brief (Docs. 147-1, 157-1) is
8 **GRANTED**. His requests for discovery and an evidentiary hearing are **DENIED**.

9 **IT IS FURTHER ORDERED** that a certificate of appealability is **GRANTED** as
10 to both remanded issues.

11 **DATED** this 30th day of May, 2018.

12 
13 Honorable Stephen M. McNamee
14 Senior United States District Judge
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